PRIVY COUNCIL REPORT

SINGARAM THANDAYUTHAPANI & ORS. v. LEMBAGA PELABUHAN KELANG

[Privy Council (Lord Keith of Kinkel, Lord Templeman, Lord Oliver of Aylmerton, Lord Goff of Chieveley & Sir Robin Cooke) July 3 & 21 1986]

[Privy Council Appeal No. 9 of 1984]

Contract – Contract of employment – Terms of employment of employees transferred from civil service to statutory body – Malayan Railway Administration transferred to statutory authority – Employees exercising option to revert to services of Railway Administration – Seconded to serve respondent for five years – Employees offered permanent employment with respondent at end of secondment – Offers accepted by employees – Conversion to Harun scale of salary – Whether employees entitled to conversion to Suffian scale before conversion to Harun scale – Port Authorities Act, 1963, s. 52.

Employment – Contract of – Service with statutory authority – Whether employees entitled to conversion to Suffian scale before conversion to Harun scale.

In this case the appellants were originally employees of the Malayan Railway Administration and therefore members of the Public Service of the Federation. On the establishment of the respondent, the appellants were transferred to the employment of the respondent. In 1966 the appellants exercised their option under section 52(2) of the Port Authorities Act, 1963, to revert to the services of the Railway Administration. Because there were no vacancies for them in the services of the Railway Administration, the appellants were required to continue to serve the respondent on secondment. The secondment under the Act was only for five years. At the end of the period the appellants were offered permanent employment with the respondent. The appellants accepted this offer. The salaries offered and accepted were those based on the Benham salary schemes. The Benham scale was replaced as regards civil servants by the Suffian salary scale on October 1, 1970 with retrospective effect to January 1, 1970 but this was not applied to employees of statutory bodies. The employees of statutory bodies received their revision of salaries under the Harun salary scheme on January 15, 1975 with retrospective effect to January 1, 1970.

As a result of the implementation of the Harun scheme the respondent converted the appellant's salary from the Benham scheme to the Harun scheme. The appellants contended that their salaries should first be converted to the Suffian scheme and then to the Harun scheme. The appellants took out a writ claiming arrears of salaries and ancillary remedies on the ground that the failure of the respondants to convert their salaries to the Suffian scheme before applying the Harun scheme to their salaries constituted a breach of their contract of employment. The suit was dismissed in the High Court and on appeal the Federal Court dismissed the appeal – see [1983] 1 M.L.J. 292, *sub nomine, Thangavelu Arumugam & Ors.* v. *Lembaga Pelabuhan Kelang.* The appellants appealed.

Held, dismissing the appeal: the High Court and the Federal Court were correct in this case in holding that the appellants ceased to be employees of the Railway Administration on their acceptance of the offers of employment by the respondents and that they were no longer entitled to the Suffian scheme of conversion. The appellants have been unsuccessful in demonstrating that either the High Court or the Federal Court were in error in any respect in concluding that the appellants had entirely failed to make out their case.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

G.T. Rajan for the appellant.

Nicholes Lyell Q.C. (*Zainudin bin Ismail* with him) for the respondent.

Cur. Adv. Vult.

Lord Oliver of Aylmerton (delivering the judgment of the Board) : This is an appeal from the dismissal on January 8, 1983 by the Federal Court of Malaysia (Raja Azlan Shah L.P., Salleh Abas F.J. and Abdoolcader J.) of the appellants' appeal from a judgment of Vohrah J. in the High Court of Malaysia dated September 4, 1982, dismissing the appellants' claim against the respondent for breach of the terms of the contract of employment of the appellants by the respondent.

Broadly the basis of the appellants' claim is that the respondent, in assessing the salary scale and terms of employment applicable to them by virtue of certain generally applicable schemes regulating the salaries of employees of different grades, has omitted to apply to them, as the starting point for the ascertainment of their correct salary scales, the scheme which should, at the relevant time, have been applied. As a preliminary, therefore, it will be convenient to say a few words about the relevant schemes although it is not necessary to consider their respective provisions in any detail. At the earliest time relevant to this appeal, that is to say, in 1965, the salary scales and conditions of employment applicable to employees of statutory bodies in Malaysia, and also to civil servants employed by the Administration, were regulated by a scheme known as the Benham Scheme.

So far as civil servants were concerned, however, the Benham Scheme was replaced on October 1, 1970 by a new scheme with different (and somewhat improved) salary scales. That scheme (the Suffian Scheme) was applied retrospectively to January 1, 1970. It seems clear that, at about the same time, the salaries of employees of statutory bodies were also under review but it took

rather longer to implement the change and it was not until January 15, 1975 that, pursuant to Service Circular No. 1 of 1975, employees of statutory bodies were notified of the calculation of their salaries under a new and improved scheme known as the Harun Scheme, again with retrospective effect from January 1, 1970.

It is against this background that the present appeal arises but before passing to the facts, which are not in dispute, reference must be made to the statute under which the respondent, a statutory body, was brought into being. It was established on July 1, 1963 by the Port Authorities Act 1963 for the purpose of taking over the management and running of Port Kelang, formerly known as Port Swettenham. Up to that time the port had been owned and managed by a government agency, the Malayan Railway Administration, staffed by civil servants. The only provisions of the Act to which it is necessary to refer are those of section 52 which regulate the staffing arrangements on the transition from the Railway Administration to the respondent (in the Act referred to as "the Authority"). That section provides as follows:

"(1) Subject to the provisions of this Act, any person who immediately before the date of establishment of the Authority was an officer or servant of the Administration and who in the opinion of the Minister is necessary to the proper operation of the port shall as from the said date become an officer or servant of the Authority, on terms and conditions of service not less favourable than those which were attached to his service immediately before that date.

(2) Any officer or servant of the Administration who has by virtue of sub-section (1) become an officer or servant of the Authority may not later than twelve months from the making of any rules under section 15 (relating to salaries, allowances and conditions of service of officers and servants) by the Authority elect in writing whether to continue in the service of the Authority or to revert to the service of the Administration; and if he elects to revert to the service of the Administration, shall thereupon revert to the service of the Administration on terms and conditions not less favourable than those which would have attached to his service had he not become an officer or servant of the Authority by virtue of sub-section (1); and his service with the Authority shall be deemed to be service with the Administration.

(3) Any officer or servant who reverts to the service of the Administration under sub-section (2) may, by reason that no vacancy is immediately available for him in the service of the Administration, be required by the Administration, and the Authority shall permit him, to continue to serve with the Authority for a period not exceeding five years."

All the appellants were, prior to the formation of the respondent, civil servants employed at Port Swettenham and on the establishment of the respondent they were duly transferred to the employment of the respondent under the provisions of sub-section (1) of section 52. It was not, however, until April 1, 1965, that the respondent made the rules referred to in sub-section (2) and the appellants were then notified of the necessity to make the election envisaged by that sub-section. On March 31, 1966 they all elected to remain as employees of the Administration (*i.e.* as civil servants). There was not, in fact, any vacancy available for them in the railway service at that time and they were, therefore, required by the Administration to continue to serve the respondent on secondment. That position remained unaltered until March 30, 1971 when the five year period under sub-section (3) expired. Throughout this period of secondment the appellants were remunerated on the Benham scale applicable to employees of a statutory body and not (as from October 1, 1970) on the Suffian scale applicable to civil servants as from January 1, 1970. It is not in dispute that as between them and their actual employers, the Railway Administration, they should have been remunerated during this period on the Suffian scale as from January 1, 1970 and in fact the Administration has since paid them arrears of salary on this basis.

On March 25, 1971 the General Manager of the respondent wrote to each of the appellants offering him the option, exercisable on or before March 31, 1971, of entering the employment of the respondent on a salary scale and subject to conditions which were in fact those applicable to the grade of employment offered under the Benham Scheme. It is unnecessary to refer in any detail to the terms of this letter but it is not unimportant, in the light of Mr. Rajan's submissions, to note clause 2(e) which is in the following terms:

"(e) that you shall no longer enjoy the rights and privileges while in the service of the Malayan Railway Administration except those provided in paragraph (k) below."

Paragraph (k) dealt with the preservation of pension rights accrued as a result of previous service with the Administration. This clause makes it entirely clear, if it was not abundantly clear already, that what was being offered was an entirely new contract of employment with the respondent and in no sense a continuation of the previous employment by the Administration. A subsequent letter of March 30, 1971 notified each of the appellants that the Railway Administration had no

vacancy to offer at a similar grade and that the alternative to exercise of the option was retirement. Each of the appellants exercised the option and accordingly entered the employment of the respondent on the terms offered in the letter above referred to as from March 31, 1971.

Following the introduction of the Harun Scheme in January 1975 each of the appellants was offered the option of conversion from the Benham scale to the Harun scale as from March 31, 1971, the conversion being effected by reference to the appropriate Benham scale applicable at the relevant date to the individual appellant's grade of employment. It is this that has given rise to the dispute, for what is said by the appellants is that, inasmuch as immediately prior to March 31, 1971 they were civil servants on secondment to the respondent, the conversion to the Harun scale should have been effected by first transferring them from the Benham scale to the Suffian scale and then calculating their equivalent salary entitlement under the Harun Scheme on that basis. It is unnecessary to particularise the figures but the contention is that, up to March 31, 1971 the appellants were, as employees of the Administration, Grade 1 officers under the Suffian Scheme and that the conversion of the salary of such a grade under the Harun Scheme would result in a substantially higher remuneration than that which the respondent acknowledges as due to them. The difference, taking all the appellants together, is something over $312,000 and that is what is now collectively claimed by the appellants by way of damages for breach of contract. The case has, however, been conducted in all courts on the basis that the case of the first appellant is typical and that, save as to the measure of damages, that which applies to him applies equally to all the other appellants.

In a carefully considered judgment, Vohrah J. rejected the appellants' claims. He found – clearly correctly – that at the conclusion of the five year period of secondment the respondent was under no obligation to offer employment to any appellant on any particular terms and that the first appellant fully realised on March 31, 1971 that he was entering into a fresh employment with the respondent. In so far as it is material, Vohrah J. also found that on a balance of probabilities the appellants would not have been accepted by the respondent for employment on the basis that they were to be graded under the Suffian Scheme, since no budget provision had been made for the payment of salary on the higher scale that would have entailed. He dismissed the appellants' claim on the short ground that they had freely entered into a new contract with the respondent on the terms of the option letter and that there was therefore no basis whatever for introducing the Suffian scale into that contract.

The appellants appealed to the Federal Court on grounds which Mr. Rajan has argued extensively before their Lordships' Board. In summary these were, first, that the contract of employment by the respondent was entered into during the period of secondment and that, that contract being on terms less favourable than those which would have been applicable if the appellants had remained civil servants, it was in breach of section 52(2) of the 1963 Act and was accordingly illegal and void; secondly, that there had, in effect, been a Cabinet Directive to the respondent to employ the appellants on the same terms as if they were civil servants, which was binding on the respondent under section 3(4) of the 1963 Act; and thirdly, that because, as it was submitted, the appellants' service with the Administration was continuing on March 31, 1971 and was never terminated by the Administration they remained civil servants and were entitled, for the purpose of their employment with the respondent, to be graded under the Harun Scheme as if they were employed under the Suffian Scheme.

The first and third of these grounds rest essentially on the same premise, namely that the five years' secondment period under section 52(3) ran until December 31, 1971 and not, as the respondent contended, until March 30, 1971. Mr. Rajan has sought to make this good by pointing to the fact that the 1963 Act contains no definition of the word "year". One is, therefore, he submits, thrown back to the Interpretation Act 1967 in which "year" is defined as meaning a year reckoned according to the Gregorian calendar. This in itself does not help Mr. Rajan because it says nothing about the date from which the year reckoned according to the Gregorian calendar is to run. He seeks to avoid this, however, by transposing the word "calendar" in the definition and attaching it to the word "year", thus equating the word "year" with "calendar year", an expression which is defined by the Act as "a year beginning on January 1". Thus, he submits, the five year period mentioned in section 52(3) ran not from the date of election under sub-section (2) but from the following January 1. This contention has only to be stated to be seen to be fallacious and their Lordships need say no more about it. It is entirely

clear that the period of five years mentioned in section 52(3) runs from the date of the election under section 52(2) and that, so far as the appellants are concerned, that period terminated on March 30, 1971. That, as the Federal Court held, disposes of any argument either that the contract with the respondent was illegal and void – in itself a curious contention to be advanced in support of the claim for damages for breach of contract – or that the appellants continued, after entering the respondent's employment, to be civil servants employed by the Administration and thus to be entitled to the benefit of the Suffian Scheme.

Mr. Rajan's second contention is based upon a provision in section 3(4) of the 1963 Act entitling the Minister to give general directions to a Port Authority as to the exercise of its functions. It is the fact that on June 16, 1970 the Ministry of Transport wrote to the respondent's General Manager enclosing certain documents which were said to show "the decision pertaining to each railway worker now serving Kelang Port Authority". One of the enclosures, it seems, was a document described as an undated Cabinet Directive consisting of a list of "Employees who are transferred to the services of Port Swettenham Authority in accordance with their present posts held". It lists, *inter alios*, the appellants giving to each his staff number and describing the post held by him as "clerical officer". Even assuming that this constituted a direction under section 3(4) it is difficult to see how it could assist the appellants to import into their contracts with the respondent some term to the effect that their salary scales are, in direct contradiction of the express terms of the contracts, to be the Suffian scales, but in fact it is, in their Lordships' view, quite unarguable that it constitutes a direction to the respondent to make an offer to the appellants of employment on terms of the Suffian Scheme when the period of secondment came to an end. Their Lordships can, therefore, find no substance in this contention.

Before their Lordships' Board Mr. Rajan sought to take yet a further point, which does not appear to have been argued before the Federal Court. He submits that under the provisions of Articles 132 and 135 of the Federal Constitution a status of irremovability is conferred on civil servants having as one of its incidents an immunity from undergoing any reduction in rank. Apart from the fact that this is not, in fact, what the Constitution says, their Lordships are entirely unable to see how it can avail an appellant who, on the judge's finding of fact, consciously and freely entered into a new contract of employment with the respondent quite inconsistent with his continuance in his former post as a civil servant. Mr. Rajan seeks to challenge the fact that the contract was freely entered into because, as he submits, the appellants were told by the Administration that the alternative to accepting the respondent's terms was being pensioned off. If they had been pensioned off, he submits, that would on his construction of Article 135 have constituted a breach of their constitutional rights. Even if this point were open in the absence of some plea of duress – and there is none – their Lordships are entirely unpersuaded that there is any substance in it; and, if there were, it would in any event be a cause of complaint not against the respondent but against the Administration.

Mr. Rajan has said all that could be said in support of the appellants' case but he has, in their Lordships' judgment, been entirely unsuccessful in demonstrating that either Vohrah J. or the Federal Court was in error in any respect in concluding that the appellants entirely failed to make out their case.

Their Lordships will accordingly advise His Majesty the Yang di-Pertuan Agong that the appeal should be dismissed. The appellants must pay the costs of the appeal to their Lordships' Board.

Appeal dismissed.

Solicitors: *Phillip Conway Thomas & Co.; Stephenson Harwood.*